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ALEXANDER L. STEVAS
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No. 83-1312

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

PIPER AIRCRAFT CORPORATION,

Petitioner

v.

SEVEN BAR FLYING SERVICE, INC.,

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. WHETHER THE UNTIMELY PETITION FOR REHEARING TOLLED THE TIME WITHIN WHICH REVIEW FOR CERTIORARI MAY BE SOUGHT.

2. WHETHER FEDERAL RULE OF EVIDENCE 407 ENTITLED "SUBSEQUENT REMEDIAL MEASURES" IN A PRODUCTS LIABILITY CASE BASED UPON THEORIES OF NEGLIGENCE AND STRICT LIABILITY BARS THE ADMISSION OF EVIDENCE OF THE PRODUCT'S SAFETY THAT IS RELEVANT AND NOT PREJUDICIAL AS DETERMINED UNDER RULES 401 AND 403.

LIST OF PARTIES

The respondent accepts petitioner's List of Parties, and adds that in the case of respondent Seven Bar Flying Service, Inc., there are no parent companies, subsidiaries or affiliates.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Seven Bar Flying Service, Inc., the respondent herein, submits that a writ of certiorari should not be granted in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit filed September 2, 1983 is reported as *Herndon* v. *Seven Bar Flying Service, Inc.*, 716 F.2d 1322 (10th Cir. 1983). The judgment of the United States District Court for the District of New Mexico was filed May 22, 1981 and was not reported.

JURISDICTION

The respondent denies that the petition for rehearing filed by Piper Aircraft Corporation was timely, and therefore submits that a writ of certiorari herein should be denied.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The respondent accepts petitioner's statement.

STATEMENT OF THE CASE

The respondent accepts the petitioner's Statement of the Case with the following exceptions and additions:

1. Circumstances of the flight.

O'Donnell and Herndon, the pilots killed in the crash, were both highly experienced. O'Donnell was taking training for the most advanced rating available to all pilots, the airline transport rating. This was a night flight, in clear weather, in which O'Donnell, seated in the left seat, wore a small visor-like hood which restricted his vision such that he was able to see only inside the plane, that is, only to view the instruments and not able to see outside at all. The jury found each pilot 10% negligent, and the manufacturer, Piper, 80% negligent.

2. Piper Service Bulletins.

Piper Service Bulletins, issued by the manufacturer Piper to owners and operators of the aircraft, set forth modifications, changes, or improvements that the Piper factory recommended be accomplished on all Piper aircraft that are

subject to the Bulletin. Piper's own witness MacDowell testified that Piper Service Bulletins had the highest priority of such information disseminated by the factory and that they would be considered "safety of flight" items. Expert mechanic Charles Craig testified out of the presence of the jury that Bulletins of the nature of Service Bulletin 331 and Service Bulletin 527 must be incorporated into the aircraft within the time limits specified or the aircraft would be considered unairworthy and its license invalid.

In contrast to the suggestion of Piper's Petition [p. 3], the incorporation of the improvement to the pilot's control wheel trim switch that was described in both Bulletins was more than an optional procedure. Through a governmental directive called an Airworthiness Directive, the Federal Aviation Administration informed all owners and users of the Piper Aztec aircraft, including the Aztec involved in the crash, *that it was mandatory* that the modification described in Bulletin 331 and Bulletin 527 be accomplished within 100 hours of flight time after the issuance of the Airworthiness Directive.

3. Airworthiness Directives.

Seven Bar sought to introduce Airworthiness Directives No. 71-12-05 and No. 77-09-10 which were directly concerned with Bulletins 331 and 527. In the case *Melville* v. *American Home Assur. Co.*, 584 F.2d 1306, 1315 (3rd Cir. 1978), Airworthiness Directives were admitted as an exception to the hearsay rule under F.R.E. 803(8). The District Court in the instant matter, with an abundance of caution and stating that the information was cumulative, denied admittance to either FAA Airworthiness Directive.

4. The admission into evidence of Piper Service Bulletin 527.

The reason for admittance of Piper Service Bulletin 527 was *not* "as direct proof of a product defect" as asserted by petitioner [pp. 3, 17, 20]. Citations in support of this very

specific claim are missing from the Petition, and respondent is not aware of any such statement in the record.

As part of the Statement Of The Case and concerning the issue of admittance of Bulletin 527, petitioner quoted the District Court's discussion and ruling allowing testimony concerning a subsequent remedial measure [p. 3 and Appendix "D", 52]. This is somewhat misleading and is suggestive that the court's words were in reference to Bulletin 527. At the time these words were spoken, the trial had been underway for three days, and Bulletin 527 had been admitted on the very first day. The subject of the court's words was a question asked of mechanic Craig regarding the use by Piper of a quick disconnect switch. Following objection by Piper that this was inadmissible under Rule 407, the court stated that the testimony would be allowed. However, Bulletin 527 was not being discussed at that time and had nothing to do with the disconnect switch.

5. Feasibility.

Contrary to the statement at p. 5 of the Petition, feasibility *was* an issue in the case.

In chambers, before the jury was selected, this subject was part of the general discussion regarding admittance of Bulletin 527. Counsel for Piper was given the opportunity to stipulate to the feasibility of the switch modification (which in fact involved only a snip of a wire cutter, clipping off a small section of a tiny 3-coil spring). Piper refused and instead agreed to submit a limiting instruction. *This instruction was never provided.*

The entire discussion concerning this subject is included in the Petition [Appendix "F", in particular at p. 61]. The Court of Appeals opinion, reported as *Herndon* v. *Seven Bar Flying Service, Inc.*, 716 F.2d 1322 (10th Cir. 1983), is reproduced as Appendix "A" of the Petition. The Appellate Court's reference to feasibility appears at p. 37 of the Petition.

REASONS FOR DENYING THE PETITION

1. Untimely petition for rehearing.

The petition for writ of certiorari filed by Piper Aircraft Corporation was not filed within the time required by Title 28, United States Code, Section 2101(c).

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on September 2, 1983.

Piper filed its petition for rehearing on September 19, 1983, three days after September 16th, the final day permitted by the Rules of Appellate Procedure, Rule 40. This petition was untimely. A motion to dismiss was filed by respondent on September 20, 1983, but the motion was not ruled upon by the Tenth Circuit.

Piper filed its petition for writ of certiorari on February 6, 1984, 67 days after the final day permitted by the aforesaid Title 28, United States Code, Section 2101(c).

The untimely petition for rehearing did not toll the time limitation of Section 2101(c). *United States* v. *Healy*, 376 U.S. 75 (1964).

Therefore, the petition for writ of certiorari herein should be denied.

2. The circuit "conflict" is exaggerated.

The asserted "raging conflict" or "war" between various jurisdictions over the issue of application of F.R.E. 407 to strict product liability claims is an exaggeration.

Petitioner has fashioned three categories of allegedly distinctly opposing positions among the Circuit Courts of Appeals. Several circuits have apparently not yet considered the issue. Of the three categories devised by petitioner only one circuit, the Eighth, comprises category No. 2, and one circuit, the Tenth, is assigned to category No. 3. The Tenth Circuit claims to have followed the Eighth Circuit. This is

hardly a "raging controversy between the various jurisdictions."

Petitioner describes the unsettled position of the Eighth Circuit and points to the varying application within the Circuit of F.R.E. 407 in strict liability cases. The Eighth Circuit has, with flexibility, altered its position to meet the individual circumstances of each case, and as noted by petitioner [p. 10] has recently taken a stance similar to petitioner's category 1.

Neither the Eighth nor Tenth has established a firm position in conflict with the other circuits. In reality, the "raging conflict" is nothing more than variations in the application of evidentiary rulings to match the circumstances of the individual cases.

Petitioner has traced the pattern of developing law within the Eighth Circuit [p. 9]. There is no need to repeat that herein. The very words of the Petition emphasize the point that this circuit has not taken a rigid position on the issue. Hence, "category 2" as identified by Piper is in reality not in conflict with the other categories.

Category 3, according to petitioner, results from the *Herndon* v. *Seven Bar Flying Service, Inc.* opinion, and allegedly demonstrates that within the Tenth Circuit, F.R.E. 407 does not apply to *any* situation involving strict liability [p. 10]. This expanded and incorrect interpretation by petitioner of *Herndon* is necessary to establish petitioner's third, so-called, conflicting category.

Herndon does not establish such a broad position for the Tenth Circuit. This is clear from a careful review of the opinion. *Herndon* supports the admission of evidence of subsequent remedial measures in this particular products liability action because of distinct factual conditions and certain strategy decisions made by Piper's counsel during trial.

The unique fact situation centers about the relationship of the government-issued Airworthiness Directives and the manufacturer-provided Piper Service Bulletins. Although

Piper succeeded in blocking admittance of the Airworthiness Directives, the underlying effect of these FAA orders was recognized by both the District Court and the Appellate Court. Under the rule of *Rozier* v. *Ford Motor Co.*, 573 F. 2d 1332, 1343 (5th Cir. 1978) and *Lolie* v. *Ohio Brass Co.*, 502 F. 2d 741, 744 (7th Cir. 1974), they were admissible as evidence of repairs made mandatory by government order. Thus, even if the District Court had not admitted Bulletin 527, it would have been required to admit the mandatory Airworthiness Directive which incorporated by reference, Bulletin 527 [pp. 40, 41].

This is a unique aspect of the *Herndon* opinion which undercuts petitioner's sweeping assertion that the Tenth Circuit has taken an exclusive position. Under the superior authority rule, *any* circuit court could support the District Court ruling, given similar circumstances.

The ruling on the *feasibility* issue of *Herndon* is a further demonstration that the Tenth Circuit's handling of this issue is not exceptional. The *Herndon* opinion notes the Fifth Circuit's endorsement in *Grenada Steel Indus., Inc.* v. *Alabama Oxygen Co.*, 695 F.2d 883 (5th Cir. 1983), of the line of reasoning which deems feasibility "controverted", unless expressly conceded.

Piper was asked to stipulate to the feasibility of modifying the pitch trim switch, but declined to so [pp. 37, 61]. Hence, the application of this exception to F.R.E. 407 by the Tenth Circuit is not exclusive. Rather, it is in line with the Fifth Circuit view of the feasibility exception.

There is no "raging conflict."

3. The opinion below was fair, accurate and correct.

As set forth above, the *Herndon* trial court refused to admit the Airworthiness Directives, considering there was a risk to Piper that overemphasis of the matter would have a prejudicial effect. At the same time, the court specifically asked counsel for Piper to submit a proposed instruction to

limit the admissibility of Bulletin 527, and Piper failed to do so [p. 61].

Piper now seeks to gloss over this omission with the claim that the Bulletin was admitted as evidence of a defect and, therefore, a limiting instruction would have been absurd and would have been refused.

This is totally misleading. First, the court itself requested a limiting instruction. Second, the court never specifically said that 527 was admitted to prove a defect.

Additionally, the court responded to Piper's objection regarding testimony of pilots who had experienced similar inflight emergencies but survived. To avoid cumulative evidence, the plaintiffs were permitted to only read the transcript of one pilot's testimony in rebuttal to testimony of Piper's pilot witness [p. 30].

It is abundantly clear that the court sought to be fair.

Furthermore, there was other tangible evidence adduced of the nature of the specific switch defect and of the unwanted driving of the stabilator trim jackscrew to the full nose down position.

CONCLUSIONS

The "three distinct positions" contrived by petitioner to support the claim of a "raging controversy" between Circuit Courts are illusions.

First, the petitioner admits that three circuits have not even ruled on the issue of the application of Rule 407 in a products liability case. Thus, not all circuits are represented in the "conflict".

Second, the petitioner has admitted that the Eighth Circuit, comprising category two, has altered its position such that it is not in conflict. This is demonstrated by a recent decision of the circuit in which application of Rule 407 to a strict liability action was upheld.

Third, the position of the Tenth Circuit, supposedly establishing a third, mutually exclusive position, is in reality merely an application of recognized evidentiary rules common to all circuits.

The Tenth Circuit upheld the admission of Bulletin 527 based on consideration of the District Court's evidentiary decision as a whole.

In particular, this included noting that (1) petitioner was offered the opportunity to stipulate to feasibility and failed to do so and (2) that petitioner was asked by the District Court to provide a limiting instruction and failed to do so.

The Tenth Circuit also pointed out that if the Bulletin had not been admitted, the same information would have been before the jury through the Airworthiness Directive.

Petitioner's argument that the Tenth Circuit has taken the position that Rule 407 does not apply to *any* situation involving strict liability is purely a distortion. No such sweeping generalization can be supported.

When the hullabaloo raised about circuit conflict is dismissed, all that remains is an effort by petitioner to seek yet a third review of the lengthy trial record. The opinion below

accurately and correctly supports a result that was fair and reasonable.

For the reasons set forth above, the respondent herein submits that a writ of certiorari should be denied in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert P. Smith, one of the attorneys for Seven Bar Flying Service, Inc., respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the twenty-ninth day of March, 1984, I served copies of Seven Bar Flying Service's Brief for the Respondent in Opposition on Piper Aircraft Corporation, petitioner herein and the only other party herein, by mailing copies in a duly addressed envelope, with first class postage prepaid, to its attorney of record.

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AFFIDAVIT OF MAILING

I, Robert P. Smith, one of the attorneys for Seven Bar Flying Service, Inc., respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on this twenty-ninth day of March, 1984, I deposited in the United States Post Office located at 1823 Stout Street, Denver, Colorado, with first class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, within the time allowed for filing, respondent Seven Bar Flying Service's Brief for the Respondent in Opposition.

_____

Robert P. Smith

State of Colorado)
) ss
County of Denver)

Subscribed and sworn to before me at Denver, Colorado, this twenty-ninth day of March, 1984.

_____

Notary Public